12-7-2009

Renzo v. Idaho State Dept. of Agr. Respondent's Brief Dckt. 36672

IN THE SUPREME COURT OF THE STATE OF IDAHO

PETER RENZO, d/b/a S.A.B.R.E. FOUNDATION, INC.

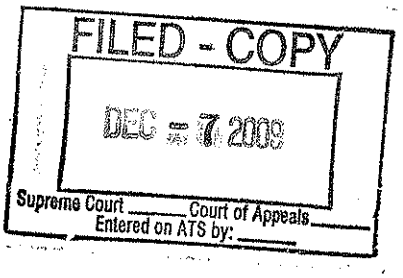
Plaintiff/Appellant,

v.

IDAHO STATE DEPARTMENT OF AGRICULTURE,

Defendant/Respondent.

Docket No. 36672



RESPONDENT'S BRIEF

Appeal from the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bingham

HONORABLE DARREN B. SIMPSON, District Judge

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I. STATEMENT OF THE CASE

A. Statement of the Facts.

This case involves an untimely claim brought by Plaintiff under the Idaho Tort Claims Act. On October 9, 2007, Dr. Greg Ledbetter ("Dr. Ledbetter"), the Administrator of the Division of Animal Industries (the "Division") at the Idaho State Department of Agriculture ("ISDA"), received an Application for a Deleterious Exotic Animal Possession Permit from Peter Renzo ("Renzo"). R., p. 23. Renzo operates the S.A.B.R.E. Foundation, Inc. ("S.A.B.R.E."), a Nevada corporation which has a stated purpose to preserve Siberian Tigers. R., p. 4. The Application was from "Peter Renzo," and it stated that the purpose of the facility he intended to develop was both "Educational" and as an "Exhibitor." R., p. 28. Renzo described himself as a "501-C-3 Foundation." Id. Under areas identifying the several cats included in the Application, Renzo circled "Propagation" as a purpose. R., pp. 29-30. Renzo did not indicate the existence of any potential contracts in relation to his application. R., pp. 28-30.

Dr. Ledbetter spent "in excess of a week" reviewing Renzo's Application in order to make a decision. R., p. 140 (Tr., p. 74, ll. 2-6). Dr. Ledbetter met with his office staff and reviewed the Application and the applicable rules regarding possession and propagation of exotic deleterious animals. Id. (Tr., p. 74, ll. 6-13). He contacted a representative of S.A.B.R.E. to verify that Renzo had a USDA license and to discuss the

type of operator Renzo was. R., p. 138 (Tr., p. 67, ll. 11-21). Dr. Ledbetter also spoke by telephone with Renzo, who explained his business and why he wanted to move to Idaho. Id. (Tr., p. 68, ll. 18-25). Dr. Ledbetter's assistant, Joelene, conducted an internet search on S.A.B.R.E. and found no significant complaints. R., p. 139 (Tr., p. 69, ll. 2-7).

Dr. Ledbetter was aware that an incident referred to as "Ligertown" was the impetus for the Idaho Legislature to pass laws with respect to the importation of deleterious exotic animals. Id. (Tr., p. 75, ll. 7-20); see also R., p. 150. He was also aware of a prior matter involving the deleterious exotic cats of Jerry Korn, in which ISDA had asked that Korn spay and neuter the animals and obtain a possession permit. R., p. 141 (Tr., p. 77, ll. 4-9); p. 178. Ledbetter believed in being consistent between the two cases as both involved deleterious exotic cats. R., p. 141 (Tr., p. 77, ll. 4-9). Dr. Ledbetter considered the opinions of all staff who had reviewed the Application and had discussed the matter, and he thereafter made the decision that spaying and neutering should be required for acceptance of Renzo's application. R., p. 141 (Tr., p. 79, l. 23 – p. 80, l. 1).

Dr. Ledbetter responded to Renzo's Application by correspondence dated October 17, 2007, stating that "Upon completion of these conditions, ISDA will issue a Possession Permit[.]" R., p. 31. Dr. Ledbetter set five conditions for approval of the Application for a Possession Permit, including that all animals be spayed or neutered

prior to shipment. Id. Dr. Ledbetter "understood that ISDA and the Administrator of the Division were authorized and empowered by statute to regulate or prohibit the importation or possession of deleterious exotic animals in the State of Idaho[,]" and, as Administrator, that he was authorized to "make, promulgate and enforce administrative rules" for those purposes. R., p. 23 (¶¶ 2-3). Pursuant to this authority, Dr. Ledbetter also recognized he was authorized by the Idaho Administrative Code to "issue or deny permits for the importation, possession and/or propagation of deleterious exotic animals." R, p. 23 (¶ 4); p.132 (Tr., p. 43, ll. 2-25). Dr. Ledbetter understood that, without proper authority from the Department of Agriculture, no person, zoo, or exhibitor could possess or propagate exotic animals. R., p. 133-34 (Tr., p. 48, l. 19 – p. 49, l. 1).

Sometime during October of 2007, Renzo called Dr. Ledbetter regarding the October 17, 2007 letter. R., p. 5 (¶ 15); pp. 88-89 (¶¶ 9-11). During this conversation, Dr. Ledbetter reiterated his position about spaying and neutering, and informed Renzo that breeding licenses could not be issued to individuals. Id. Shortly thereafter, Renzo hired attorney Nick L. Nielson ("Nielson"). R., p. 90 (¶ 12).

On November 2, 2007, the Division received a reply letter from Nielson. R., p. 32. Nielson indicated that he had been retained by S.A.B.R.E. in connection with its October 9, 2007 Application for a possession permit. Id. Nielson stated, "I have not been presented with any information whatsoever which would preclude Peter

Renzo/S.A.B.R.E. Foundation from being issued a breeding permit." R., p. 33. Nielson also stated, without offering explanation, "It is critical for the Foundation's future that we hear from you as soon as possible." Id. Nielson did not indicate the existence of any contracts in relation to the application. R., p. 32-33.

After conferring with the State of Idaho Attorney General's Office, Dr. Ledbetter responded to Nielson on November 17, 2007, stating that it was "in the public interest to strictly regulate the importation or possession of deleterious exotic animals." R., pp. 24, 34. Dr. Ledbetter also cited administrative rules, stating that no person may propagate deleterious exotic animals. Id. ISDA had not issued a propagation permit since the passage of the Deleterious Exotic Animal Act, and Dr. Ledbetter told Nielson that a propagation permit would not be issued. Id. He also reiterated the conditions stated in the October 17, 2007 letter under which Renzo's possession permit could be issued. R., pp. 34-35.

Dr. Ledbetter believed that he had the authority to set forth the conditions and rules by which he would approve a permit, and that he was acting within this authority. R., p. 25 (¶¶ 10-11). He had no knowledge of any potential contracts between Renzo or S.A.B.R.E. and any other person or entity relating to the permit requests, and likewise did not intend to cause a breach of any contract. Id. (¶ 14). He never intended

to harm or believed that his actions would harm Renzo, S.A.B.R.E., or the animals. Id. (¶¶ 12-13).

On December 7, 2007, Nielson requested a reconsideration of the denial of the "S.A.B.R.E. Foundation's request for a Propagation Permit." R., p. 36. No mention was made of any prospective contracts or economic interests related to the application. R., pp. 36-38. Renzo never applied for a propagation permit (or breeding permit) to ISDA. See Reporter's Transcript on Appeal, p. 6, ll. 5-12; p. 15, ll. 21-23; p. 16, ll. 16-19.

S.A.B.R.E. filed a Petition for Judicial Review (Case No. CV-2007-3162), dated December 14, 2007. On April 24, 2008, District Judge Ted V. Wood issued an Order finding in favor of S.A.B.R.E. and setting aside ISDA's decision. R., pp. 45-46. Judge Wood stated the following about ISDA's decision:

> 2. The Department of Agriculture's decision was made in the absence of any specific criteria promulgated by the Department for awarding propagation permits. Specifically, the Department demanded spaying and neutering without established criteria allowing for such demands.
>
> . . . .
>
> 5. Pursuant to I.C. § 67-5279(2)(d), the Department of Agriculture's decision was arbitrary, capricious, and an abuse of discretion.

The District Court remanded the matter back to ISDA, and ordered that ISDA "shall, within a reasonable amount of time, adopt criteria and/or rules for which possession and

propagation permits are issued and apply these rules and criteria fairly to Petitioner's application." R., p. 46. See also R., p. 135 (p. 56, ll. 15-18).

Renzo moved for reconsideration of the District Court's Order, arguing that it should be allowed to operate in Idaho under already existing rules instead of requiring S.A.B.R.E. to wait for ISDA to adopt criteria. R., pp. 48, 197. The District Court denied Renzo's motion, stating that "if the Court were to grant the permit as requested by Petitioners, the Court would be substituting its judgment for that of the [ISDA] and adopting rules and regulations on a de facto basis[.]" R., p. 48. The District Court continued by stating, "[T]he decision of the [ISDA] whether to grant or deny a permit in this case is not ministerial and is strictly discretionary[.]" R., p. 49.

B. Procedural History.

Renzo filed a Notice of Claim in this matter on May 14, 2008, or approximately 210 days after Dr. Ledbetter wrote his October 17, 2008 letter stating that spaying and neutering was a condition precedent to Renzo obtaining a possession permit. R., pp. 12-14. Renzo's Notice of Claim described two alleged wrongful acts in paragraph 3, entitled "Cause of damages:"

> Greg Ledbetter, Administrator of the Division of Animal Industries for the Idaho State Department of Agriculture, issued a letter on November 16, 2007 demanding that Peter Renzo and S.A.B.R.E. Foundation spay and neuter their tigers and other cat(s) before the State of Idaho would grant a deleterious exotic animal permit to Renzo/S.A.B.R.E.

> Foundation. Ledbetter further refused to issue a Propagation Permit to Renzo/S.A.B.R.E. Foundation.

R., p. 12.

Renzo filed a Complaint on October 6, 2008, claiming that he was entitled to damages in an amount exceeding $12,000,000.00 as a result of denial of both possession and propagation permits. R., pp. 3-11 (¶¶34-35, 38-39). Renzo's *Complaint* made claims based on Idaho Code §§ 6-904, 6-904B(3), and also a claim of "Tortious Interference with Plaintiffs' Prospective Economic Advantage." Id.

On January 6, 2009, ISDA filed a Motion to Dismiss, together with supporting brief and affidavits, arguing that (1) Renzo had failed to comply with the notice requirements of Idaho Code § 6-905; (2) ISDA was immune from liability pursuant to Idaho Code §§ 6-904(1) and 6-904B(3); (3) Renzo had failed to state a claim of tortious interference with prospective economic advantage; and (4) ISDA did not have a duty to protect against purely economic losses. R., p. 20. Renzo filed a Memorandum in Opposition to Defendant's Motion to Dismiss on April 7, 2009. R., p. 51.

On May 27, 2009, the District Court issued its Opinion and Order Granting Summary Judgment in Favor of Defendant, treating ISDA's Motion as a motion for summary judgment. R., pp. 219, 223. The District Court granted ISDA's Motion, holding that Renzo failed to file his notice of tort claim within 180 days of the date of receipt of the October 17, 2007 letter and ISDA was also entitled to immunity under

Idaho Code §§ 6-904(1) and 6-904B(3). R., pp. 227-42. The District Court also found that Renzo had failed to raise a genuine issue regarding his claim for tortious interference and had failed to show that ISDA owed Renzo a duty under the economic loss rule. R., pp., 242-49. The District Court entered final judgment on May 27, 2009, and Renzo appealed that judgment on July 7, 2009. R., pp. 251, 254.

ADDITIONAL ISSUE PRESENTED ON APPEAL

Is ISDA entitled to attorney fees on appeal pursuant to Idaho Code § 6-918A and Idaho Appellate Rule 41?

III. ARGUMENT

A. Standard of Review on Appeal of Summary Judgment.

When the Supreme Court reviews a trial court's decision on summary judgment, it employs the same standard as that properly employed by the trial court when originally ruling on the motion. Herrera v. Estay, 146 Idaho 674, 677, 201 P.3d 647 (2009). "Summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Id. (citing IDAHO R. CIV. P. 56(c)). All disputed facts are to be construed liberally in favor

of the nonmoving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the nonmoving party. Id. Summary judgment is appropriate where the nonmoving party bearing the burden of proof fails to make a showing sufficient to establish the existence of an element essential to that party's case. Cantwell v. City of Boise, 146 Idaho 127, 133, 191 P.3d 205 (2008).

B. The District Court was correct in ruling that Renzo failed to comply with the notice requirements of Idaho Code § 6-905 by filing its Notice of Claim at least 196 days following the occurrence of a "wrongful act."

The Idaho Tort Claims Act ("ITCA") requires that "[a]ll claims against the state arising under the provisions of this act . . . for any act or omission of the employee within the course or scope of his employment shall be presented to and filed with the secretary of state within one hundred eighty (180) days from the date the claim arose or reasonably should have been discovered, whichever is later." IDAHO CODE § 6-905. "No claim or action shall be allowed against a governmental entity or its employee unless the claim has been presented and filed within the time limits prescribed by this act." IDAHO CODE § 6-908.

The 180-day notice period begins to run at the occurrence of a wrongful act, even if the extent of the damages is not known or is unpredictable at the time. Magnuson Properties P'ship v. City of Coeur d'Alene, 138 Idaho 166, 169-70, 59 P.3d 971 (2002). Compliance with the notice requirement is a "mandatory condition

precedent to bringing suit, the failure of which is fatal to a claim, no matter how legitimate." "Knowledge of facts which would put a reasonably prudent person on inquiry" triggers the 180-day period. "A claimant is not required to know all the facts and details of a claim" before the 180-day period is triggered. Id.

Renzo's Notice of Claim specifically describes two alleged wrongful acts: (1) ISDA's demand that Renzo and S.A.B.R.E. "spay and neuter their tigers and other cat(s) before the State of Idaho would grant a deleterious exotic animal permit[;]" and (2) ISDA's refusal to issue a Propagation Permit. R., p. 12 (¶ 3). Renzo presented his Notice of Claim to the Secretary of State on May 14, 2008, believing that the 180-day period was triggered by ISDA's November 16, 2007 letter. R., p. 12. However, the period was actually triggered by ISDA's October 17, 2007 letter, which stated that all tigers needed to be spayed or neutered prior to shipment as condition of granting a permit. R., p. 31. Knowledge of these facts had the effect of putting Renzo on inquiry, for sometime in October of 2007 Renzo called ISDA to explain his case and ask for clarification, (R., p. 5 (¶ 15); p. 89 (¶ 11)), and he also hired an attorney who wrote to ISDA requesting additional explanation. R., p. 90 (¶ 12).

In Magnuson the plaintiff ("Magnuson") sought to develop property within the city of Coeur d'Alene. Id. at 168. The city required Magnuson to extend the sewer line from its property to an adjoining parcel owned by a third party. Magnuson alleged

the city engineer promised to reimburse him for the cost of the extension. On May 10, 1996, Magnuson submitted its costs to the city and on August 13, 1996, in a letter received by Magnuson on August 15th, the city denied the existence of an agreement, as well as Magnuson's request for reimbursement. Magnuson attempted to contact the city on several occasions following his receipt of the August 13, 1996 letter, and at a meeting with the city on November 7, 1996, the city reiterated its denial. Id. at 168-69. Magnuson filed suit on February 18, 1997. In reviewing the case on appeal the Idaho Supreme Court held that at the very latest, Magnuson had knowledge of the August 13, 1996 letter upon receiving it on August 15, 1996, which placed its notice beyond the 180-day period. "As of August 15, 1996, a reasonable and prudent person would have knowledge of facts of a wrongful act, i.e., the City's denial of and/or breach of the alleged contract." Id. at 170.

Renzo attempts to distinguish Magnuson by arguing that only one issue was raised by Magnuson, and that his situation was different because it ultimately involved two issues, i.e., the denial of both a possession permit and a propagation permit. This distinction is unsupported in the law. ISDA's letter of October 17, 2007 provided ISDA's position not only on possession, but also propagation. See Reporter's Transcript on Appeal, p. 21, l. 6 – p. 22, l. 7. More importantly, Renzo was not required to "know all the facts and details of [his] claim" before the notice period began to run. Magnuson,

138 Idaho at 170; McQuillen v. City of Ammon, 113 Idaho 719, 747 P.2d 741 (1987) (holding that 120-day period began to run following knowledge of first wrongful act even though claimant had alleged two wrongful acts in Notice of Tort Claim).

The first allegedly "wrongful" act occurred by October 17, 2007 (if measured by the October 17, 2007 letter) and at the latest by October 31, 2007 (if measured by the personal communication between Renzo and Dr. Ledbetter in October). Other than including additional legal authority, ISDA's November 16 letter simply reiterated Dr. Ledbetter's earlier positions. Accordingly, Idaho Code § 6-905 required that Renzo's Notice of Claim be filed no later than April 28, 2008. Renzo's failure to file the Notice of Claim until May 14, 2008, or 196 days after October 31, 2007, was fatal.

C. The District Court correctly ruled that Renzo failed to raise a genuine issue of material fact as to the malice requirement under Idaho Code § 6-904(1).

The authority for the actions of Dr. Ledbetter appears in Title 25, Chapter 39, Idaho Code, and related regulations. Specifically, Idaho Code § 25-3901 defines the intent of the Legislature regarding deleterious exotic animals in the State of Idaho:

> The Idaho legislature finds and declares that the agriculture industry, wildlife of the state, and the environment are all important components of Idaho's economy, and that it is in the public interest to strictly regulate the importation or possession of deleterious exotic animals up to and including prohibition of the importation or possession of such animals.

Consistent with the legislature's intent, ISDA is granted broad authority to regulate or prohibit importation or possession of deleterious exotic animals:

> The department of agriculture and the administrator of the division of animal industries are authorized and empowered to regulate or prohibit the importation or possession of any deleterious exotic animals.

IDAHO CODE § 25-3902. Furthermore, the administrator is also granted special legislative and executive powers to "make, promulgate and enforce necessary administrative rules":

> The administrator of the division of animal industries is hereby authorized and empowered to make, promulgate and enforce necessary administrative rules . . . for the regulation or prohibition of the importation or possession of deleterious exotic animals.

IDAHO CODE § 25-3903. At the time this action arose, the regulation governing importation of deleterious exotic animals provided "The Administrator may authorize, by permit, the importation of deleterious exotic animals[.]" IDAPA 02.04.27.100 (emphasis added). The regulation governing propagation of deleterious exotic animals likewise provided, "The Administrator may authorize, by permit, the following entities to propagate deleterious exotic animals[.]" IDAPA 02.04.27.150 (emphasis added).

Idaho Code § 6-904(1) establishes immunity for governmental entities such as ISDA with respect to certain specific types of claims:

> A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:

> 1. Arises out of any act or omission of an employee of the governmental entity exercising ordinary care, in reliance upon or the execution or performance of a statutory or regulatory function, whether or not the statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused.

Renzo does not question that, pursuant to Title 25, Chapter 39 of the Idaho Code and IDAPA 02.04.27, Ledbetter was performing a discretionary function. R., p. 235, p. 27. The only issue on appeal is whether ISDA acted with malice. "Malice" as used in the Idaho Tort Claims Act is defined as "the intentional commission of a wrongful or unlawful act, without legal justification or excuse and with ill will, whether or not injury was intended." BECO Constr. Co., Inc. v. City of Idaho Falls, 124 Idaho 859, 864, 865 P.2d 950 (1993); Evans v. Twin Falls County, 118 Idaho 210, 216 n. 6, 796 P.2d 87 (1990) ("malice within the definition of the Tort Claims Act means 'actual malice'"). There is a rebuttable presumption that "any act or omission of an employee within the time and at the place of his employment is within the course and scope of his employment and without malice . . . ." IDAHO CODE § 6-903(e). The District Court drew all reasonable factual inferences in favor of Renzo and set forth, in full, Renzo's claim of malice. See R., pp. 235-36. Even if the facts as stated by Renzo were true, Renzo did not establish a genuine issue of material fact that ISDA acted with "actual malice." R., p. 238.

In Evans, deputies were dispatched to the Evans' home to execute on a writ of execution. The Evanses claimed that although only one deputy was invited, all the deputies came inside. The deputies stood in the doorway with their hands on their guns, and on one occasion threatened to arrest Mr. Evans. The deputies were "rude, loud, vulgar, threatening and unnecessarily demanding," and made the Evanses feel like prisoners in their own home. Id. at 211. When Mrs. Evans tried to call her attorney, one deputy allegedly restrained her from doing so by grabbing her arms and twisting them, forcing her downward, knocking the glasses off her face and causing her immense, visible pain. The officers refused to take a personal check for the judgment, and followed Mrs. Evans to the bank to obtain a cashier's check. Mrs. Evans was treated for anxiety, back aches, capsulitis and hyperventilation, among other things, as a result of the event. The Evans Court held that malice requires "a wrongful act without justification combined with ill will[,]" and found no evidence of the requisite malice or criminal intent and affirmed the District Court's summary judgment ruling on immunity. Id. at 216, 216 n.6.

In the case at bar, Renzo alleges that after learning of Dr. Ledbetter's decision from his October 17, 2007 letter, he called Dr. Ledbetter and explained his situation. R., pp. 89-90. According to Renzo, in response to a question regarding the breeding of animals by zoos, Ledbetter stated he wasn't concerned about zoos. Id. Dr. Ledbetter stated that he could not give licenses to individuals but he would check with

the Attorney General. Id. at 90. Renzo's assistant, Rebecca Harris, called sometime afterward and discussed similar matters with Dr. Ledbetter. Id. at 97. Harris said "[Dr. Ledbetter] wasn't trying to stop us from coming into Idaho, we were welcome, as long as we spay and neuter our cats." Id. Harris explained that breeding was part of S.A.B.R.E.'s mission statement, to which Dr. Ledbetter responded that "wasn't his problem." Id. Ledbetter explained to Harris that a propagation permit "couldn't be approved because he 'just couldn't make any exceptions.'" Id. at 98. Ledbetter also mentioned that the "Ligertown" incident had made the state cautious about the breeding of tigers. Id.

Drawing all reasonable inferences in favor of Renzo, the District Court found that these facts "pale[] in comparison to the conduct alleged in *Evans*[.]" R., p. 238. Making this determination did not constitute, as Renzo contends, an improper "weighing" of evidence. To the contrary, Renzo simply has offered no evidence of an "intentional commission of a wrongful or unlawful act, without legal justification or excuse and with ill will." BECO Constr. Co., 124 Idaho at 864. Renzo has made no additional legal or factual arguments other than those which were made to the District Court. He has simply asked no more of this Court than to second guess the decision of the District Court in this matter, which this Court has repeatedly declared it will not do. Teton Peaks Investment Co. v. Ohme, 146 Idaho 394, 399, 195 P.3d 1207 (2008). The

District Court correctly granted ISDA summary judgment on the ground of immunity under Idaho Code § 6-904(1).

D. The District Court correctly ruled that ISDA was entitled to immunity under Idaho Code § 6-904B(3) as it did not act with gross negligence or reckless, willful and wanton conduct.

ISDA is also immune from liability under Idaho Code § 6-904B(3), which provides for governmental immunity in the following situations:

> A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent and without gross negligence or reckless, willful and wanton conduct as defined in section 6-904C, Idaho Code, shall not be liable for any claim which:
>
> . . . .
>
> 3. Arises out of the issuance, denial, suspension or revocation of, or failure or refusal to issue, deny, suspend, or revoke a permit, license, certificate, approval, order or similar authorization.

"Gross negligence" and "reckless, willful and wanton conduct" are defined by Idaho Code § 6-904C as follows:

> 1. "Gross negligence" is the doing or failing to do an act which a reasonable person in a similar situation and of similar responsibility would, with a minimum of contemplation, be inescapably drawn to recognize his or her duty to do or not do such act and that failing that duty shows deliberate indifference to the harmful consequences to others.
>
> 2. "Reckless, willful and wanton conduct" is present only when a person intentionally and knowingly does or fails to do an act creating unreasonable risk of harm to another, and which involves a high degree of probability that such harm will result.

Relying on Nelson v. Anderson Lumber Co., 140 Idaho 702, 712, 99 P.3d 1092 (Ct. App. 2004), the District Court found that in order to establish gross negligence, Renzo would have to establish that ISDA owed a duty to Renzo and S.A.B.R.E. In Nelson, the Nelsons submitted an application for a building permit to Fremont County. The County issued the Nelsons a permit indicating that the county building inspector had completed a check sheet based upon materials submitted with the Nelsons' application. However, after completion of the structure, the building inspector visited the property and informed the Nelsons that the structure did not meet snow load requirements. The Nelsons sued Fremont County, claiming that the building inspector acted with gross negligence by failing to perform a review of the design plans and failing to inform the Nelsons of flaws in advance of their construction. On summary judgment, the District Court found no evidence of gross negligence. On appeal, the Court of Appeals held that "[t]he Nelsons cite to no authority in support of their position that would create a duty on the part of a county building inspector to each building permit applicant, rather than just to the building inspector's employer." Id. at 712.

Similarly, Renzo has not established a duty on the part of the ISDA Administrator to each applicant for a possession permit. Renzo's claim that "Dr. Ledbetter had the duty to grant permits if all requirements of the rules were met" was

soundly rejected by the District Court based on the statutory discretion granted to Ledbetter as ISDA Administrator. R., pp. 240-41.

Even if Renzo had cited authority to show a duty, he has failed to show a genuine issue of material fact regarding the existence of gross negligence or reckless, willful and wanton conduct. Given the clear directive from the Legislature, as well as general knowledge of the potential harm to Idaho's agriculture and wildlife should a deleterious exotic animal escape, a "reasonable person in a similar situation and of similar responsibility" would not "be inescapably drawn" to recognize a duty to issue not only a possession permit, but a propagation permit.

Furthermore, Dr. Ledbetter could not foresee a high degree of probability that S.A.B.R.E. would incur "damages through loss of sponsor(s) and through loss of revenues[.]" R., p. 13. Ledbetter was not trying to keep S.A.B.R.E. from coming to Idaho. He "welcomed" them to come and was willing to grant S.A.B.R.E.'s possession permit. R., p. 95 (¶ 5).

Absent any showing of a "duty," "gross negligence" or "reckless, willful and wanton conduct," the District Court correctly determined that ISDA is shielded by the immunity exception in Idaho Code § 6-904B(3).

E. The District Court correctly held that Renzo failed to raise a genuine issue of material fact with regard to his claim for Tortious Interference with Prospective Economic Advantage.

To establish a claim for intentional interference with prospective economic advantage, Renzo must have shown (1) the existence of a valid economic expectancy; (2) knowledge of the expectancy on the part of the interferer; (3) intentional interference inducing termination of the expectancy; (4) the interference was wrongful by some measure beyond the fact of the interference itself; and (5) resulting damage to the plaintiff. Cantwell v. City of Boise, 146 Idaho 127, 138, 191 P.3d 205 (2008). The District Court correctly granted summary judgment on this claim, on the basis that there was no evidence that (a) Dr. Ledbetter intended to induce termination of any of S.A.B.R.E.'s contracts, and (b) the interference was wrongful by some measure beyond the fact of the interference itself. See R., pp. 242-45.

Renzo argues that the District Court erred by failing to consider the case of Highland Enterprises, Inc. v. Barker, 133 Idaho 330, 986 P.2d 996 (1999). Renzo's case, however, is not supported by the decision in Highland. In that case, an environmental group protested the building of roads in a forest. Highland Enterprises had been hired to conduct the road construction. Protest activities included tree-sitting, pole-sitting, digging holes in the road, chaining protesters to construction equipment, damaging roads and tree-spiking. Activists also placed boards in the road with nails protruding, damaged

construction equipment, and placed sharpened rebar in the road among other interferences. The protesters bought land near the proposed roads for a base camp and engaged in fund raising. Id. at 335-36.

The Court in Highland determined that it was reasonable to infer from the evidence that the conduct was substantially certain to interfere with Highland's economic advantage. The Court further held that it was reasonable to conclude that a necessary consequence of the actions of the protesters would be that those constructing the roads would suffer financially. Accordingly, the Court found that the third element of the tort had been satisfied. Id. at 340-41.

Even taking the facts as presented by Renzo to be true, Renzo has not established that Dr. Ledbetter intended to interfere with Renzo's economic advantage. As Dr. Ledbetter "welcomed" S.A.B.R.E. to come to Idaho (R., p. 97 (¶ 5)), was willing to grant a possession permit (R., p. 243), and was never told that S.A.B.R.E. would lose its investor if propagation was not allowed, it is not reasonable that Dr. Ledbetter could anticipate that the requirement of spaying and neutering would lead to termination of Renzo's economic expectancy.

Regarding the fourth element, Renzo has not shown how Dr. Ledbetter's discretionary decision constituted an "interference by improper means." To be actionable, the means must be wrongful by reason of a statute or other regulation, or a

recognized rule of common law, or an established standard of a trade or profession. Downey Chiropractic Clinic v. Nampa Restaurant Corp., 127 Idaho 283, 286, 900 P.2d 191 (1995). Some additional examples of improper means include violence, threats or other intimidation, deceit or misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehood. None of these apply in this case.

Dr. Ledbetter understood his discretionary authority according to statute to regulate or prohibit the importation or possession of deleterious exotic animals. He acted consistent with that authority, within the scope of his employment, and without malice. He had no duty to grant a permit.

F. The District Court correctly ruled that ISDA did not owe a duty to Renzo to prevent pure economic loss.

The general rule in Idaho is that there is no recovery for pure economic loss, as there is no duty to prevent economic loss to another. Nelson v. Anderson Lumber Co., 140 Idaho 702, 710, 99 P.3d 1092 (2004). Renzo's Complaint alleges economic damages arising from the loss of his economic expectancy. R., pp. 246-47. Renzo makes this clear in his Notice of Claim, where he alleges that S.A.B.R.E. has been damaged through "loss of sponsor(s) and through loss of revenues in the approximate amount of $12,938,000.00." R., p. 13.

Renzo now raises, for the first time on appeal, the argument that he also suffered non-economic losses. However, in stark contrast to the case of Aardema v. U.S.

Dairy Sys., Inc., 147 Idaho 785, 215 P.3d 505 (2009), cited by Renzo in support of his claim, neither Renzo's Complaint nor his Notice of Claim make any claim for non-economic loss or property damage. Even if he had so alleged in his Complaint, there has been no evidence presented at any time that would support such claims.

Furthermore, contrary to Renzo's argument, his claims do not come within the "special relationship" exception to the economic loss rule. Again, the District Court in this case relied on Nelson v. Anderson Lumber Company, where the Court of Appeals determined that because the Nelsons had failed to establish a duty owed by Fremont County, the Court did not need to address the special relationship argument as it related to the County. Nelson, 140 Idaho at 712 n.5. The same analysis applies here.

In any event, the special relationship exception would not apply in this case. This exception is applied in "extremely limited" situations "where the relationship between the parties is such that it would be equitable to impose such a duty." Blahd v. Richard B. Smith, Inc., 141 Idaho 296, 301, 108 P.3d 996 (2005). Idaho courts have found such a special relationship only: (1) where a professional or quasi-professional performs personal services; or (2) where an entity holds itself out to the public as having expertise regarding a specialized function, and by so doing, knowingly induces reliance on the performance of that function. Id. Renzo cites to Duffin v. Idaho Crop Improvement Assn., 126 Idaho 1002, 895 P.2d 1195 (1995), claiming that a special

relationship existed between ISDA and S.A.B.R.E. under the second special relationship exception which would impose a duty on ISDA to prevent economic loss. Duffin does not support Renzo's argument.

In Duffin, the Idaho Crop Improvement Association ("Association") was the only entity in Idaho authorized to certify seed potatoes. Id. at 1008. The Association held itself out to the public as having expertise in seed certification and induced reliance on that expertise. The Federal-State Inspection Service ("FSIS") also inspected seed for diseases. A farmer relied on the Association's expertise and bought the certified seed. Later, it was discovered the seed was defective and the farmer suffered economic losses. The Idaho Supreme Court held that a special relationship existed between the farmer and the certifying Association because the Association had "engaged in a marketing campaign . . . to induce reliance by purchasers on the fact that the seed ha[d] been certified." Id. However, the Court explained that the special relationship exception did not apply to the FSIS because there was no evidence in the record to "conclude that it ha[d] actively sought to induce reliance on the part of purchasers of certified seed." Id.

The Court in Duffin drew a clear distinction between the entity which marketed its services in an active effort to induce reliance on the part of purchasers, and an entity that did not. Renzo has produced no evidence suggesting that ISDA marketed itself, knowing that it would induce reliance upon its services.

The economic loss rule applies to preclude Renzo's pure economic claims.

G. Renzo's argument that the District Court violated federal law by issuance of its Opinion and Order is unsupported by fact or law.

Renzo argues that "[t]hrough its rulings that SABRE could have avoided economic loss by simply sterilizing an endangered species, the district court impliedly promoted the diminishment of an endangered species for economic gain." Appellant's Brief, p. 39. Renzo cites to no authority for the proposition that the District Court violated the law by issuing its Opinion and Order Granting Summary Judgment in Favor of Defendant.

H. ISDA is entitled to an award of its attorney fees and costs on appeal.

Idaho Code Section 6-918A provides for an award of attorney fees "upon a petition therefor and a showing, by clear and convincing evidence, that the party against whom or which such award is sought was guilty of bad faith in the commencement, conduct, maintenance or defense of the action." Bad faith is defined as "dishonesty in belief or purpose." Cordova v. Bonneville County Joint Sch. Dist. No. 93, 144 Idaho 637, 643, 167 P.3d 774 (2007). In his appeal, Renzo has asked this Court simply to second-guess the trial court's decision in every instance, and to do so is in bad faith. Accordingly ISDA is entitled to an award of its attorney fees and costs on appeal pursuant to Idaho Code Section 6-918A and Rule 41 of the Idaho Appellate Rules.

II. CONCLUSION

Renzo filed an untimely tort claim against the State of Idaho. That fact controls this appeal. Renzo's appeal has asked this Court to second-guess the District Court on all issues. Renzo has shown no more than that the actions of Dr. Ledbetter were cautious and discretionary. For the foregoing reasons the decision of the District Court should be affirmed, awarding attorney fees and costs to Respondent.

RESPECTFULLY SUBMITTED this 4th day of December, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, either by mailing, hand delivery, or by telecopying to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; or by facsimile transmission.

DATED this 4th day of December, 2009.

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